LOKE YOON MINK & ANOR.

v.

ONG FINANCE (HK) LTD.

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[CIVIL SUIT NO. 22-196-88]
7 MAY 1990

CIVIL PROCEDURE: *Setting aside or discharge of ex parte order and writ - Order 11 r. 6(1) and Form 14 of the Rules of the High Court 1980 - Death of second plaintiff - Certain facts not before the Court - Proper forum - Multiplicity of proceedings.*

The plaintiffs had earlier obtained an *ex parte* order for leave to issue a notice of a writ of summons against the intended defendants and to serve the said notice out of jurisdiction at Hong Kong. The defendants in turn filed an application to set aside the *ex parte* order on the basis of suppression of facts by the plaintiffs and on the question of forum.

Held:

[1] The death of the 2nd plaintiff in the process of service did not invalidate the order given for service out of the jurisdiction as he was in fact alive on the date of the order. Except for causes of action for defamation, seduction, enticement of another persons spouse and damages for adultery, all actions survive against or for the benefit of a party to the action.

[2] There had been no suppression of material facts as the other cases in Hong Kong and Malaysia between the same parties as cited were of no relevance. Since the transaction had been done by way of fax with each party in their respective countries, there is no reason why the plaintiffs had to go to Hong Kong to file the action.

[Defendant's application dismissed with costs. By consent matter stayed pending appeal to the Supreme Court.]

Legislation referred to:
Rules of the High Court 1980, O. 11 r. 6(1), Form 14

Other source referred to:
Mallal's Supreme Court Practice, by Chang Min Tat 2nd Edn., p. 129

For the plaintiffs - L.A. Gomes; M/s. L.A. Gomes & Co.
For the defendants - G. Moganasundram; M/s. Mogan & Co.

JUDGMENT

Abdul Malek Ahmad J:

The defendants had on 29 June 1989 applied to set aside or discharge the *ex parte* order made on 9 December 1988 granting the plaintiffs leave to issue a notice of a writ of summons against the intended defendants and to serve the said notice of writ on them at 11/F, Dina House, Ruttonjee Centre, 11 Duddell Street, Hong Kong or elsewhere. The said order had also specified that the time of entry of an appearance in the action of the intended defendants be twelve days after service on them of the notice of writ and that the costs of the application be paid by the intended defendants in any event. By this application, the defendants were also applying for the writ of summons dated 17 October 1988 and the service thereof on the

defendants to be set aside, for all further proceedings in this suit to be stayed pending the disposal of this application or until further order, for the plaintiffs to pay the costs of this application and for such further or other relief.

Despite this application being made on a certificate of urgency, the matter was not heard until nine months later due to the numerous applications of both Counsel on the grounds mainly that one or the other of them was not well. Finally, when it was heard on 21 March 1990, learned Counsel for the defendants had advanced the following arguments in support of their application:

a) that O. 11 r. 6(1) and Form 14 of the Rules of the High Court 1980 (hereinafter 'the Rules') had not been complied with;

b) that it was not brought to the Court's attention that the second plaintiff had died on 26 December 1988 and the writ had been issued on 25 May 1989;

c) that the plaintiffs had suppressed that fact:

i) that the defendants had obtained judgment against the plaintiffs in Hong Kong High Court *vide* Civil Suit 1987 No. A 8957 for the sum of HK$948,678.17 cents together with interest on the sum of HK$941,118.21 cents from 29 December 1987 to the date of judgment at the rate of Hong Kong prime rate plus 2% of HK$1,170 fixed costs,

ii) that the defendants had obtained judgment against the first plaintiff on 21 February 1989 in Hong Kong High Court *vide* Civil Suit 1987 No. A8588 for the sum of HK$1,731,285 and HK$22,097.93 cents with interest on the former sum from 19 December 1987 to the current date and further interest at the judgment rate until payment and HK$1,105 as fixed costs, and

iii) that the first plaintiff had *vide* Ipoh High Court Civil Suit 23-45-88 counterclaim against the defendants for HK$641,260 for the alleged fraudulent transfer from the first plaintiff's account without proper authorisation;

d) that if these suppressed facts had been brought to the Court's attention, the Court would not have granted leave;

e) that judgments had already been taken in Hong Kong in similar suits; and

f) that as the transactions were in Hong Kong, the proper forum was the Hong Kong Courts.

At the other end, learned Counsel for the plaintiffs had reiterated:

a) that the plaintiffs were objecting to the supporting affidavit as it was filed by a solicitor in Malaysia;

b) that all related matters were in Hong Kong;

c) that the affidavit of service for the earlier application was done by a reputable Hong Kong legal firm;

d) that Form 14 had not been exhibited with the affidavits as it was already in the Court file;

e) that the second plaintiff had died only in the process of service although he was very much alive at the time of filing of the suit;

f) that the plaintiffs were suing as joint holders in joint and several capacities and despite the death of one plaintiff, the other could continue;

g) that there was no suppression of material facts;

h) that the plaintiffs had never consented to the Hong Kong jurisdiction and had filed similar cases in Malaysia where the plaintiffs reside and from where the plaintiffs had done the transactions; and

i) that there was no multiplicity of proceedings.

Upon perusal of the file, the Court found that the request for service of the document abroad dated 7 March 1989 and filed on 9 March 1989 at Encl. 6 was in accordance with Form 14 of the rules and the affidavit of service at Exhibit LYM1 of Encl. 15 affirmed on 30 May 1989 was quite in order. The death of the second plaintiff in the process of service could not and did not, to my mind, invalidate the order given for service out of the jurisdiction as he was in fact alive on the date of the order. *Mallal's Supreme Court Practice* by Chang Min Tat 2nd Edn., at p. 129 had clearly enunciated that except for causes of action for defamation, seduction, enticement of another person's spouse and damages for adultery, all actions survive against or for the benefit of a party to the action. In fact, where a co-plaintiff dies, the action is not abated as between the surviving parties. I therefore found no necessity to delete the second plaintiff's name as suggested by learned Counsel for the plaintiffs. I also held that there had been no suppression of material facts as the other cases in Hong Kong and Malaysia between the same parties as cited were of no relevance here. Since the transaction had been done by way of fax with each party in their respective countries, I saw no reason why the plaintiffs had to go to Hong Kong to file the action.

On these considerations, I had dismissed the defendants' application with costs but by consent of both Counsel allowed the stay pending appeal to the Supreme Court with costs in the cause.

Also found at [1990] 2 CLJ 252